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**Comptroller General  
of the United States**

Washington, D.C. 20548

## Decision

**Matter of:** Colonel Robert D. Slay, USMC (Retired)

**File:** B-228790.2

**Date:** March 1, 1991

### DIGEST

Uniformed Services Former Spouses' Protection Act excepts veterans disability compensation from the disposable retired pay the government may pay to a retired member's former spouse pursuant to court-ordered apportionment. Where veterans disability compensation is increased retroactively, and the retired member earlier waived retired pay equal to his entitlement to such compensation, the disposable retired pay subject to apportionment by court order should be adjusted downward retroactively to reflect the retroactive increase. Further, GAO would not object if the service decides that waiver of the former spouse's resulting debt, which is less than \$500, is appropriate under 10 U.S.C. § 2774.

### DECISION

This decision responds to a request from the Marine Corps Finance Center for an advance decision on whether retired Colonel Robert D. Slay's disposable retired pay must be retroactively adjusted downward for purposes of a court-approved apportionment of it on behalf of his former spouse, to reflect a retroactive increase in the member's entitlement to disability compensation from the Department of Veterans Affairs (VA).<sup>1/</sup>

The Marine Corps' concern is that such adjustment would lead to the conclusion that Colonel Slay's former spouse, who had been receiving half of his disposable retired pay under the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408 (1988), and pursuant to court decree, had been overpaid by the Marine Corps during the retroactive period. Section 1408(e) of title 10 limits the amount of retired pay that is payable by the government to a former spouse pursuant to a court-approved property settlement to 50 percent of

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<sup>1/</sup> The matter was assigned control number DO-MC-1486 by the Department of Defense Military Pay and Allowance Committee.

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"disposable" retired pay, which, according to section 1408 (a) (4), does not include "amounts waived in order to receive [VA] compensation . . . ."2/

In our view, the Marine Corps should adjust Colonel Slay's disposable retired pay, retroactively, for purposes of 10 U.S.C. § 1408, and reimburse him the amount that the adjustment shows should not have gone to his former wife, approximately \$185. Also, we see no basis to object if the Marine Corps determines that waiver of the collection of that amount from the Colonel's former spouse is proper under the service's authority at 10 U.S.C. § 2774 to waive government claims of less than \$500 in appropriate circumstances.

Because 38 U.S.C. § 3104 (1988) prohibits the concurrent payment of retired pay and VA compensation, in 1974 Colonel Slay waived his retired pay to the extent of his VA disability compensation entitlement, as allowed by 38 U.S.C. § 3105. The purpose of the waiver provision is to permit a retiree to receive retired pay and veterans benefits, not to exceed the full rate of retired pay, without terminating the status that gives the right to either one. 36 Comp. Gen. 799, 802 (1957). In this respect, retirement pay is taxable, but VA disability compensation is not.

In February 1987, the VA retroactively increased Colonel Slay's disability compensation entitlement for the period beginning May 1, 1986. The VA's action did not result in any actual payment by the VA to Colonel Slay, since he already had received the same amount of money in the form of retired pay; however, the Colonel presumably took advantage of the tax consequences of the action. The Marine Corps adjusted Colonel Slay's retired pay, starting in March 1987, to reflect the new award.

The Marine Corps did not retroactively recalculate the disposable retired pay Colonel Slay had received, for purposes of payment to his former spouse under 10 U.S.C. § 1408. The Marine Corps points out that recalculation necessarily results in the conclusion that Colonel Slay's former spouse was overpaid during the retroactive period, since she received half of the original disposable retired pay, which included an amount that the VA now has caused to be characterized as VA disability compensation. The Marine Corps

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2/Notwithstanding this limitation, we note that the two parties entered into an agreement on May 5, 1980, amending their 1975 property settlement to acknowledge that Colonel Slay also would pay his former spouse half of the VA disability compensation for which he waived retired pay.

asks for our decision as to the propriety of a retroactive adjustment; of collecting or waiving the amount shown to have been overpaid to the former spouse; and of reimbursing a like amount to Colonel Slay.

We think the retroactive adjustment should be made, since the waiver Colonel Slay executed in 1974 applies, in our view, to the retroactive VA award. In our decision in 55 Comp. Gen. 1402 (1976), we considered the effect of a waiver on a retroactive VA disability compensation award to a retired Air Force officer who had accepted civilian employment, and whose total pay (civilian and retired) had been reduced to comply with the Dual Compensation Act. The retired officer maintained that the retroactive award operated to reclassify the appropriate amounts of retired pay received during the retroactive period as disability compensation, which is not subject to the dual compensation formula, so that he had been deprived of the full monetary benefit he would have received had he properly gotten his full VA disability pay from the outset.

We agreed with the retired officer that post-waiver payments equal in amount to the retroactive VA compensation entitlement should be reclassified as disability compensation and considered not to be subject to reduction under the Dual Compensation Act. This position reflected the rule we stated in 36 Comp. Gen., supra (another dual compensation case), that where a service member waives his retired pay in an amount equal to his VA entitlement, he ceases to be legally entitled to that amount of retired pay as of the date the waiver becomes effective.

Accordingly, the Marine Corps should recalculate the pay Colonel Slay received during the retroactive period, to reflect the retroactive VA award, in accordance with the waiver of retired pay in favor of VA disability compensation that he signed in 1974.

The result of this adjustment is, as the Marine Corps points out, that part of the retired pay of which the Colonel's former spouse received half has been redesignated disability pay, which was not available to her for court apportionment under 10 U.S.C. § 1408. The Marine Corps asks whether that amount should be collected from Colonel Slay's former wife, or whether collection may be waived.

The Secretary of the service concerned has the authority under 10 U.S.C. § 2774 to waive, in appropriate circumstances, a government claim of not more than \$500 that resulted from an erroneous payment to or on behalf of a member or former

member. We see no basis to object if the Marine Corps determines that waiver is appropriate pursuant to that authority.

*for* *Sheldon F. Aorstar*  
Comptroller General  
of the United States